(1) Supreme Court, U.S.
FILED
09-578 SEP 10 2009
OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Stephanie Stark – Petitioner

vs.

State of Maine – Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE MAINE SUPREME JUDICIAL COURT

PETITION FOR WRIT OF CERTIORARI

BRIEF FOR THE PETITIONER

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Question Presented

Whether the imposition of a sentence of imprisonment by a state court judge prior to giving a defendant's counsel the opportunity to be heard on sentencing violates a defendant's Sixth Amendment right to counsel as it is incorporated through the Fourteenth Amendment.

List of Parties

The parties to the proceeding in the Maine Supreme Judicial Court were Petitioner Stephanie Stark and Respondent State of Maine.

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PROOF OF SERVICE

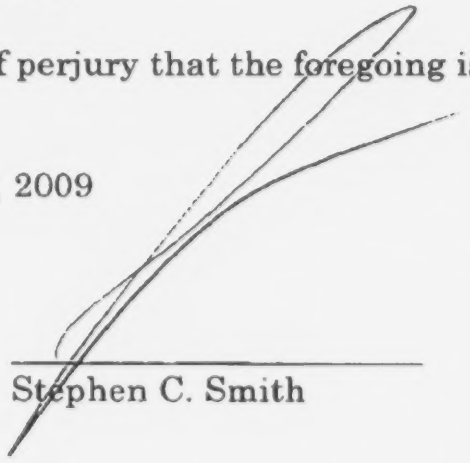
I, Stephen C. Smith, do swear that on this date, November 5, 2009, as required by Supreme Court Rule 29, I have served the enclosed PETITION OF A WRIT OF CERTIORARI on each party to the above proceeding, and on every other person required to be served, by deposition an envelope containing the above documents in the United States mail properly addressed to each of them with first-class postage prepaid.

The name and address of the party served is as follows:

Michael E. Povich, District Attorney
Prosecutorial District Number VII
70 State Street
P.O. Box 722
Ellsworth, Maine 04605

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 5, 2009



Stephen C. Smith

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

Opinions Below

The opinion of the Maine Supreme Judicial Court, Maine's highest court to review the merits, appears at Appendix A to the petition and is unpublished.

The Judgment and Commitment of the Maine Superior Court appears at Appendix B to the petition and is unpublished.

The opinion of the Sentence Review Panel appears at Appendix C to the petition and is unpublished.

Jurisdiction

The judgment of which review is sought was entered by the Maine Supreme Judicial Court on June 11, 2009. A copy of that decision appears at Appendix A. Jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1257(a) (1988).

Constitutional and Statutory Provisions

The Sixth Amendment, set out in full at Appendix D of this petition, states in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to have the Assistance of Counsel for his defense."

The Fourteenth Amendment, set out at Appendix E of this petition, states in pertinent part: "No State shall...deprive any person of life, liberty, or property, without due process of law."

Statement of the Case

On June 11, 2007, Stephanie Stark was convicted by a jury of two (2) counts of Gross Sexual Assault (Class B), one (1) count of Unlawful Sexual Contact (Class C), two (2) counts of Assault (Class D) and two (2) counts of Unlawful Sexual Touching (Class D). Ms. Stark was acquitted of one (1) count of Gross Sexual Assault (Class A), two (2) counts of Gross Sexual Assault (Class B), one (1) count of Unlawful Sexual Contact (Class B) and one (1) count of Unlawful Sexual Contact (Class C).

Prior to a sentencing hearing, both Ms. Stark and the State submitted sentencing memorandums to the sentencing court on the same day, September 25, 2007. Basically, each sentencing memorandum argued what sentence would be appropriate based on the Maine statutory sentencing guidelines. In her sentencing memorandum, Ms. Stark essentially argued for a sentence that would have her serve six (6) months with

six (6) years of probation. The State's memorandum argued for a sentence that would basically have Ms. Stark serve six (6) years with six (6) years of probation.

In addition to each party submitting a sentencing memorandum, the Probation and Parole Department submitted a Pre-Sentencing Evaluation. This evaluation was submitted to the sentencing court on September 21, 2009. After going through an extensive review of a number of factors, the Pre-Sentencing Evaluation recommended a sentence that would basically have Ms. Stark serve six (6) years with six (6) years of probation.

A sentencing hearing was held on September 27, 2007, before Active-Retired Superior Court Justice William Broderick at the Hancock County Superior Court. At her sentencing hearing, Ms. Stark's counsel argued that the court should consider mitigating factors and addressed significant exaggerations made by the State in its sentencing memorandum and by the probation officer in a pre-sentencing report. Additionally, Ms. Stark's counsel presented six witnesses who provided information pertaining to Ms. Stark's character.

After a sentencing presentation by all parties involved, the sentencing judge indicated that he had performed the statutory three-step analysis, had prepared a written analysis and this written analysis "was on file in the clerk's office for the benefits of the parties and anyone else who is interested." App. F, pg. 65a. The sentence imposed on Ms. Stark by the judge basically had her serving seven (7) years with four (4) years of probation. After describing the reasoning underlying his decision, the judge indicated that "[a]ll the sentences have

been imposed. They are in the sentencing analysis." App. F, pg. 67. In other words, the sentencing judge had decided the sentence for Ms. Stark and filed that sentence with the clerk's office before the sentencing hearing took place.

Not only did the order of events in the sentencing indicate the sentence imposed on Ms. Stark was decided before the September 27, 2007 sentencing hearing, but the timeline also shows the sentence was imposed before the sentencing judge had meaningful time to review the sentencing memoranda of either the State or Ms. Stark. The sentencing analysis referred to by the sentencing judge as being on file with the court clerk was a twelve-page document dated September 25, two days prior to the hearing. Time and effort was clearly put into that analysis. However, as discussed above, both the State and Ms. Stark filed written sentencing memoranda with the court on September 25 – the same day the original Sentencing Analysis was signed – leaving no time for the sentencing judge to sufficiently review the arguments of either Ms. Stark or the State.

An amended Sentencing Analysis dated September 27, 2009, was filed by the sentencing judge the same day as the sentencing hearing. Importantly, when compared, the amended Sentencing Analysis is exactly the same as the Original Sentencing Analysis except for a change in title and a change in date.

Without any explanation, the sentencing judge sentenced Ms. Stark to serve an amount of time greater than the sentence requested by either her, the State or Probation and Parole. Furthermore, no reference is made

at all to the numerous mitigating witnesses offered by Ms. Stark at her hearing.

On October 10, 2007, Ms. Stark applied to the Maine Supreme Judicial Court Sentencing Panel to allow an appeal of her sentence, in part because she alleged her due process rights were violated when her right to be represented by counsel at sentencing was not observed by the sentencing judge. The Sentencing Panel denied an appeal without issuing findings on September 8, 2008.

Ms. Stark sought discretionary review of her sentence as part of her appeal she filed of her case. In arguing that the trial judge erred in his sentencing procedure, Ms. Stark argued the court's use of a predetermined sentence imposed 2 days before the sentencing hearing infringed on her right to have counsel at sentencing. In a decision dated June 11, 2009, the Maine Supreme Judicial Court held in pertinent part that it was not going to review Ms. Stark's sentence "because the sentence review panel had already denied her leave to appeal and the alleged illegality is not clear from the face of the record." App. A. 1.

Having exhausted her state remedies, Ms. Stark now seeks review by this Honorable Court on the question of whether her constitutional rights were violated when a sentence was imposed upon her prior to the court hearing from her counsel.

Reason for Granting Petition

"In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his

defense." U.S.CONST. amend. VI. When applied through the Due Process Clause of the Fourteenth Amendment, the Sixth Amendment contains an absolute right to counsel. Mempa v. Rhay, 389 U.S. 128, 134 (1967) (citing Gideon v. Wainwright, 372 U.S. 335 (1963)). This petition seeks to address an open question of whether the Sixth Amendment, as applied to the States through the Fourteenth Amendment, requires that a sentencing judge provide a defendant's counsel with an opportunity to be meaningfully heard regarding sentencing prior to the imposition of a sentence.

"[T]he sentencing is a critical stage of the criminal proceeding at which [the defendant] is entitled to effective assistance of counsel." Gardner v. Florida, 430 U.S. 349, 358 (1977) (citing Mempa, 389 U.S. 128). While a defendant has no right to a particular sentence, "[t]he defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence." Gardner, 430 U.S. at 358. Important in the sentencing process is the manner in which the information to be relied upon by the sentencing judge is gathered, presented and analyzed. See Mempa v. Rhay, 389 U.S. 128, 135 (1967); see also Townsend v. Burke, 334 U.S. 736, 741 (1948) (sentence predicated on misinformation where a defendant was denied counsel amounted to a denial of due process). A judge does have discretion to consider a broad range of information when imposing a sentence, although the information-gathering process is presumably legitimized by some type of hearing. See Williams v. People of State of New York, 337 U.S. 241, 244-45 (1949)(Judge permitted to rely on wide range of

information, and while an adversarial hearing is not required, the defendant in that case was at least permitted an opportunity to be heard prior to the imposition of his sentence.)

In this case, the Maine State Supreme Judicial Court affirmed a state sentencing procedure that effectively denied a defendant the right to be represented by counsel at the sentencing stage. Under Maine law, a sentencing judge is required to apply a three-step analysis to determine a term of imprisonment for a defendant convicted of a Class A, B or C crime. Me. Rev. Stat. Ann. tit. 17-A, § 1252-C (1995). A sentencing judge is accorded wide discretion when determining what sources and types of information he will consider when imposing a sentence. See State v. Rosa, 575 A.2d 727, 730 (Me. 1990). A restriction on this discretion, however, is that the sentencing procedure must afford a defendant the opportunity to deny or explain information considered in determining the appropriate sentence. Id. (citing State v. Hardy, 489 A.2d 508, 512 (Me. 1985)).

As outlined above, the Maine process for imposing a term of imprisonment requires the sentencing judge to consider information pertaining to the case and to a defendant. A right to counsel at the sentencing stage includes that counsel will be permitted the opportunity to deny or explain information considered by the judge. Indeed, "[t]he sentencing stage...is the time at which for many defendants the most important services of the entire proceeding are performed." Vela v. Estelle, 708 F.2d 954, 964 (5th Cir. 1983).

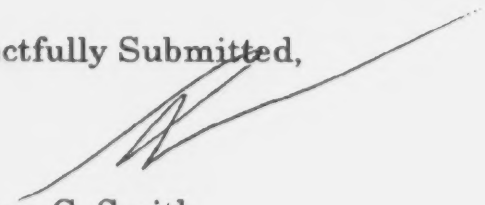
The events leading up to Ms. Stark's sentencing demonstrate a process undertaken by the sentencing judge that did not permit her counsel to argue at a critical stage in her prosecution. Ms. Stark's counsel was permitted to introduce a sentencing memorandum, argue on her behalf at a sentencing hearing and present character witnesses. However, the entire presentation of Ms. Stark's defense counsel was meaningless because, in reality, the sentencing judge had already made up his mind and imposed a sentence on Ms. Stark on September 25, 2009. This was before her counsel presented any sentencing argument, either written or oral. In this way, Ms. Stark's position was no different than that of an indigent defendant denied assistance of counsel during sentencing. See generally Mempa, 389 U.S. 128.

Ms. Stark was substantially prejudiced by the inability to be heard by counsel because the sentencing judge was not presented with the majority of the mitigating information until after sentence had been imposed. See Smith v. Puckett, 907 F.2d 581, 583 (5th Cir. 1990) (The "Sixth Amendment right to have counsel present...is determined by 'whether potential substantial prejudice to defendant's rights inheres in a particular confrontation and the ability of counsel to help avoid that prejudice'" (quoting United States v. Wade, 388 U.S. 218, 227 (1967)). The sentencing judge's failure to consider Ms. Stark's sentencing memorandum and his failure to listen to the oral argument of Ms. Stark's counsel or to her five character witnesses amounted to Ms. Stark being deprived of her right to counsel at a critical stage in her prosecution.

Conclusion

Denying Ms. Stark the right to be heard by counsel at her sentencing violated her constitutional right to be heard at a critical stage in her prosecution. In order to address this injustice, and to ensure that other defendants are not foreclosed from having the opportunity to appear through counsel at the sentencing stage, it is requested that this Honorable Court issue the requested writ of certiorari.

Respectfully Submitted,



Stephen C. Smith

November 3, 2009

MAINE SUPREME JUDICIAL COURT

Reporter of Decisions
Decision No. Mem 09-106
Docket No. Han-07699

Clerk of the Law Court

STATE OF MAINE

V.

STEPHANIE STARK

Submitted on Briefs June 4, 2009
Decided June 11, 2009

Panel: SAUFLEY, C.J., and ALEXANDER, LEVY, and GORMAN, JJ

MEMORANDUM OF DECISION

Stephanie Stark appeals from a judgment of conviction entered in Superior Court (Penobscot County, Brodrick, and A.R.J.) upon jury finding her guilty of two counts of gross sexual assault (Class B), 17-A M.R.S. § 253 (2)(D) (2008); one count of unlawful sexual contact (Class C), 17-A M.R.S. § 255- A (1)(B) (2008); two counts of assault (Class D), 17-A M.R.S. § 207(1)(A)(2008); and two counts of unlawful sexual touching (Class D), 17-A M.R.S. § 260(1)(A) (2008).

Contrary to Stark's contention, the court did not abuse its discretion in ordering the joiner of charges

stemming from allegations that took place on separate dates and with separate victims. *See State v. Pierce,* 2001 ME 14, ¶12, 770 A.2d 630, 634 ("The court has wide discretion in deciding [whether to order joinder and severance], and its decision is not grounds for new trial unless prejudice and abuse of discretion are shown."). Additionally, the court did not abuse its direction in refusing to grant more than eight peremptory challenges for Stark and her co-defendant Peter Mills to share. *See State v Rollins,* 2008 ME 189, ¶ 19, 961 A. 2 d 546, 551 (stating that we review the supervision of peremptory challenges for an abuse of discretion); *State v. Chattley,390* A.2d 1080,1087; 15 M.R.S.§2152 (2008) ("If leave to appeal is denied, the decision of the [sentence review] panel shall be final and subject to no further review.")

The entry is:

Judgment affirmed.

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STATE OF MAINE

SUPERIOR COURT
CRIMTNAL ACTION
HANCOCK, ss.
Docket Nos. CR-05-275
and CR-06-43

STATE OF MAINE,

V.

PETER D. MILLS,

Defendant,
and

SENTENCING
ANALYSIS

STATE OF MAINE,

V.

STEPHANIE E. STARK,

Defendant.

When sentencing defendants on serious cases, judges are required to undertake a three-step analysis. 17-A M.R.S.A. § 1252. First, the judge has to determine the basic period of imprisonment by considering the particular nature and seriousness of the crime as committed by the defendant. Next, the judge has to determine the maximum period of imprisonment by considering all other relevant factors, aggravating and mitigating, appropriate to the case. During this second step in the analysis, the judge considers, among other things, the defendant's character, his or her criminal history, the impact of the crime on the victim and the protection of public interest. Third, the judge has to determine what portion, if any, of the maximum sentence should be suspended and how long, if at all, the defendant is to be placed on probation.

In this case the defendants were found not guilty of all of the Class A crimes which carry a maximum penalty of 30 years. Instead, they were convicted of multiple Class B crimes, each of which carries a maximum imprisonment of 10 years. Defendants were also convicted of a Class C crime and some misdemeanors, which carry lesser maximum sentence.

The key sentencing questions in this case are how much of the 10 year sentence should be imposed and served and whether any of these sentences should be imposed consecutively.

First we examine the particulars of the Class B Gross Sexual Assaults to determine where, on the range of 0 to 10 years, the proper basic term of imprisonment lies.

Mr. Mills was convicted of 6 Class B Gross Sexual Assaults and Ms. Stark was convicted of 2 Gross Sexual Assaults. In a case involving multiple offenses of the same class, it is appropriate for the sentencing judge to select a primary offense in determining the basic term of imprisonment, State of Maine v. Eugene Downs, Jr., 2007 ME 41, 9¶ 12, 916 A.2d 210, 213-14. I have chosen Mr. Mills' Count 3 and Ms. Stark's Count 2. They both involve defendants' gross sexual assault on Ms. Ellen Desjardins.

The particulars of this crime are grim.

The non-consensual acts include vaginal and anal penetration, penetration by vibrator, penetration by ornament and sexual mauling with hands and mouth. Both defendants engaged in sexual acts with Ellen Desjardins while she was physically incapable of resisting the acts, yet was awake enough to realize what was being done to her. The sense of helplessness and humiliation caused by this selfish, cruel conduct was vividly articulated by Ms. Desjardins on the witness stand. All Ms. Desjardins could do was plead with the defendants to stop. They did not stop.

In their sexual assault of Ms. Desjardins, Mr. Mills and Ms. Stark used physical force that went beyond

holding and applying pressure to a helpless woman. In particular, when Ms. Desjardins made a feeble attempt to hold her legs together to prevent some of the sexual acts, Mr. Mills used his fists repeatedly to separate her legs while Ms. Stark held Ms. Desjardins down. The finding of use of physical force does not contradict the not guilty verdicts on the count alleging forcible rape. Those not guilty findings are properly construed to mean that the jury was not satisfied that these victims submitted to a sexual act as a result of compulsion. Instead the jury found that the victims submitted as a result of being administered drugs. Evidence of a beating can exist in a case involving drugs and did exist in the assault on Ms. Desjardins.

Another pertinent fact that bears mentioning in determining the basic sentence on the Class B gross sexual assault of Ms. Desjardins is the drawn out nature of the assaults. This was not a quick over and done with act. Mr. Mills and Ms. Stark took their time.

Finally, it should be noted that the gross sexual assault on Ms. Desjardins was premeditated. This is different from the assault on Ms. Clark and Ms. Cote. The evidence concerning the sexual assault on Ms. Cote and Ms. Clark showed the crime possibly being an afterthought following a long night of voluntary drinking. Drugs were clearly used but there is considerable doubt as to premeditation.

The assault on Ms. Desjardins happened within 48 hours after Mr. Mills and Ms. Stark had their way with Ms. Clark and Ms. Cote. Ms. Desjardins, unlike Ms. Cote and Ms. Clark, did not know Mr. Mills or Ms. Stark. They met through a fluke advertisement. Mr. Mills and Ms. Stark arrived at Ms. Desjardins' home sober and in Ms. Stark's case, uninvited. The assaults did not follow a long night of voluntary drinking. Ms. Desjardins was rendered helpless almost immediately after a small amount of wine. This was clearly a premeditated decision to commit sexual mayhem.

Having examined all of the particulars and the seriousness of the crime, I am satisfied that the basic sentence for Ms. Stark's Count II and Mr. Mills Count III Gross Sexual Assault should be 10 years.

The particulars of the gross sexual assaults against Ms. Cote and Ms. Clark by Mr. Mills (Counts 10 & 17) and Ms. Stark (Count 9) are similar in some respects to the gross sexual assault on Ms. Desjardins but not in all respects. There is no evidence that Mr. Mills used his fists. There was no evidence of the use of glass ornaments for penetration. There was evidence that drugs were administered. Ms. Clark's feeling of helplessness almost exactly replicated Ms. Desjardins' experience. Also the assaults were drawn out. Nevertheless, as stated above, it is difficult to tell whether these assaults were planned or simply evolved from a night of voluntary, heavy drinking. The assault on Ms. Cote and Ms. Clark was first in time and this adds to the ambiguity. The lack of clear

evidence of planning makes the criminal conduct somewhat lower down on the continuum for this type of offense.

I am satisfied that the basic sentence for Ms. Stark's Count 9 and Mr. Mills' Counts 10 and 17 should be 7 years.

Mr. Mills was convicted of actually administering the drugs to all three victims (Counts 2, 9, and 16) while Ms. Stark was acquitted of that same charge (Counts 2 and 8).Because the administration of the drug was closely intertwined with the sexual assaults that followed, I am satisfied that the basic sentence on Mr. Mills' Count 2 should be 10 years as well. The basic sentence on Mr. Mills' Count 9 and 16 should be 7 years. All other basic sentences connected to the assault on Ms. Cote and Ms. Clark should be reduced proportionately.

In examining the other charges for which Mr. Mills and Ms. Stark were convicted, I find that the basic sentence should be at the mid-point of the statutory range. This does not mean this criminal conduct was not reprehensible. It was. It simply means that on a continuum of such charges, they are not unusual. Therefore, on Mr. Mills' Count 5 the basic sentence is 30 months. On Mr. Mills' Counts 12, 13, 14, 15, 16, 20, 21 and 22, the basic sentence is 4 months. On Mr. Mills' Counts 6 and 7 the basic sentence is 6 months. On Ms. Stark's Count 5 the basic sentence is 30 months. On Ms. Stark's Counts 6 and 7 the basic sentence is 6 months. On

Ms. Stark's Counts 11 and 12, the basic sentence is 4 months.

The next step in the sentencing process under 17-A M.R.S.A. § 1252-C(2) is to determine the maximum period of imprisonment The sentencing judge must consider all other relevant sentencing factors, both aggravating arid mitigating, that are relevant to the case. I find the following factors to be relevant:

1. Criminal Record: Mr. Mills has no criminal history of any note. He has a few minor youthful indiscretions and a few speedings, only one of which is recent. Ms. Stark has two convictions for operating under the influence but no record of violent crimes of any sort or of any crimes not involving a motor vehicle. This is a mitigating factor for both defendants.

2. Character of the Defendants: Mr. Mills' character, according to the letters submitted on his behalf, was exemplary prior to the time he committed these crimes. He has made significant contributions to his community. Both his employer and his employees (he has held several management positions) describe him as hard working, intelligent, dependable, professional, honest, loyal, trustworthy and respectful of both men and women. He is praised for the good things he has done for his parents. He is loved by his child, his nephews and nieces. His family describes him as a loving, caring, warm, compassionate and forgiving. His friends describe him as helpful, quick-witted, humorous, outgoing, kind, sensitive,

thoughtful and generous. His friends say he is a giver, not a taker. Even his ex-wife describes him as caring, considerate, compassionate and generous.

Ms. Stark has submitted letters as well. She is described as a fine person with many excellent qualifies. Her PSI reveals that she took steps to educate herself with a Bachelor's in Environmental Science. She secured a good job at Jackson Laboratory. She is a hard worker. She seems to have been a productive citizen prior to committing these crimes.

Mr. Mills' character, as reflected in the letters submitted on his behalf, is another mitigating factor. Character is a mitigating factor for Ms. Stark as well.

3. The Effect of the Offenses on the Victims: The victims chose not to submit impact statements. Nevertheless, all three testified at trial. Ms. Clark came across as a very strong, intelligent young woman. She realizes something very bad happened to her. She is determined to put this incident behind her and not let this assault ruin her life. She would not even have reported the crime except that she wanted to support her friend, Michelle Cote. Ms. Clark is pursuing a graduate degree at a prestigious university.

Ms. Cote has been hurt by this attack. Because she was unconscious until the end of the assault, she remembers little of it. She knows from what little she remembers and from the condition of her body after the

assault that she was violated. She is an intelligent young lady pursuing a teaching career. It is difficult to tell how this crime will affect her down the road.

Judging from her testimony on the stand, Ms Desjardins is haunted by the attack. She remembered very little at first. Now the details of the attack come in flashes so she is constantly reminded of her fear and humiliation. Ms. Desjardins is a registered nurse and not without resources. Nevertheless, she has been deeply scarred by this crime.

The effect of these crimes on the victims, especially Ms. Desjardins, is a significant aggravating factor.

4. Protection of the Public Interest: It is difficult to tell whether Mr. Mills or Ms. Stark would be a future threat. Mr. Mills' risk assessment in the pre-sentence investigation (PSI) is contradictory. Ms. Stark's risk assessment is low, but the test, through no fault of hers, is not reliable. There is no evidence that either Mr. Mills or Ms. Stark has done anything like this before. Mr. Mills is 50 and will be in his mid to late 50's when he finishes his prison term. Men that age are less likely to re-offend. Ms. Stark, for reasons discussed below, does not strike me as a repeat offender. Protection of the public interest is neither an aggravating or mitigating factor.

5. Multiple Offenses: The Law Court in State of Maine v. Eugene Downs Jr.,2007 ME 41, ¶ 12, 916 A.2d 210, 214, said that multiple offenses are an aggravating

factor. Mr. Mills was convicted of 6 Class B crimes, one Class C crime, and 10 misdemeanors, 6 of which were offenses against the person. That totals 13 offenses against the person and is a significant aggravating factor. Ms. Stark was convicted of 2 Class B crimes, 1 Class C crime, and 4 misdemeanors, all of which were crimes against the person. That is an aggravating factor but less significant by degree.

6. Multiple Defendants: The jury decided that Mr. Mills and only Mr. Mills administered the drugs that rendered these victims helpless. There was other evidence in this case to support an inference that although Ms. Stark was a willing participant, Mr. Mills was the leader and Ms. Stark was the follower. Ms. Stark testified (and the testimony of Ms. Clark and Ms. Desjardins appeared to corroborate this) that Mr. Mills' libido was waning and he urged Ms. Stark to have lesbian sex to help him get sexually aroused. Ms. Stark was having an affair with Mr. Mills and was willing to cooperate. The evidence suggests that but for Mr. Mills, these crimes would never have happened. Mr. Mills' role as leader is an aggravating factor. Ms. Stark's role as a follower is a mitigating factor.

7. Remorse: None. Mr. Mills says nothing happened. He blames the victims and the District Attorney for wrongfully prosecuting him. At trial Ms. Stark testified that whatever happened was consensual. Now she has chosen to say nothing. Ms. Stark's testimony at trial is an aggravating factor. Mr. Mills' attitude as expressed in his PSI is a significant aggravating factor.

Having weighed the aggravating and mitigating factors, I am satisfied that the maximum sentence for Mr. Mills should remain 10 years and the maximum sentence for Ms. Stark on her Class B conviction involving Ms. Desjardins should be reduced to 7 years. This reduction has nothing to do with differences in gender. It has everything to do with the jury determination that the moving party in these crimes was Mr. Mills. To be consistent Ms. Stark's other maximum sentences should be reduced proportionately. Therefore, Ms. Stark's Count 9 will be 5 years. Her Count 5 maximum sentence will be 21 months. On Ms. Stark's Counts 6 and 7 her maximum sentence will be four months. On Ms. Stark's Counts 11 and 12, her maximum sentence will be three months.

Step three of the sentencing process requires the judge to determine what portion, if any, of the maximum period of imprisonment should be suspended and further determine what period of probation is appropriate. However, before the court addresses the issue of suspension and probation, it is appropriate in a case such as this that involves multiple crimes, to address the issue of consecutive sentences.

The Legislature has provided the groundwork for consecutive sentences in 17-A M.R.S.A. § 1256. Looking at the legislative guidelines, I find that neither Mr. Mills nor Ms. Stark was out on bail when these crimes were committed. Nor were they on probation. Nor do the defendants have criminal records of any import. However,

I find that their present convictions are based on two discrete crimes. The conduct was similar but the crimes were discrete in regard to time, place and the victims. Ms. Desjardins had no connection whatsoever with Ms. Clark and Ms. Cote. Imposing all of these sentences concurrently would mean, in effect, that there would be no punishment for one or the other victim. It is true that multiple crimes were considered in determining the maximum sentences. Nevertheless, retribution is a very important part of the sentencing process. Concurrent sentences would create the appearance of no retribution for either Ms Desjardins on the one hand or Ms. Cote and Ms. Clark on the other. Consecutive sentences are appropriate in this case.

Turning now to the issue of suspension. The crimes are heinous and deserve serious imprisonment. Nevertheless, both Mr. Mills and Ms. Stark are first offenders and both have led productive lives in the past. The sentence must not diminish the gravity of the offense. At the same lime it must encourage rehabilitation if that is possible. Given the age of these defendants, their lack of any criminal history, and their formerly productive lives, and their strong support groups, I believe rehabilitation is possible through a combination of an appropriate period of incarceration followed by probation with counseling conditions.

The sentences will be:

Mr. Mills:

Count 2 10 years

Count 3 10 years

Count 5 30 months

Count 6 6 months, $400 fine

Count 7 30 months

Count 9 7 years, consecutive to Counts 2,3, 5,6, and 7, all suspended, 3 years probation.

Count 10 7 years concurrent to Count 9, consecutive to Counts 2, 3, 4, 5, and 7, all suspended, 3 years probation.

Count 11 26 months, concurrent to Counts 9 and 10, consecutive to Counts 2, 3,5, 6 and 7, all suspended, 2 years probation.

Count 12 4 months, concurrent to Counts 10 and 11, consecutive to Counts 2, 3,5, 6 and 7, all suspended, 1 year probation.

Count 13 4 months, concurrent to Counts 10, 11, and 12, consecutive to Counts 2, 3, 5, 6 an 7, all suspended, 1 probation.

Count 14 4 months, concurrent to Counts 10, 11, 12 and 13, consecutive to Counts 2, 3, 5, 6 and 7, all suspended.

Count 15 4 months, concurrent to Counts 10, 11, 12, 13, and 14, consecutive to Counts 2, 3, 5, 6 and 7, all suspended.

Count 16 7 years, concurrent to Counts 10, 11, 12, 13, 14, and 15, consecutive to Counts 2, 3, 5, 6 and 7, all suspended, 3 years probation.

Count 17 7 years, concurrent to Counts 10, 11, 12, 13, 14, 15, and 16, consecutive to Counts 2, 3, 5, 6 and 7, all suspended, 3 years probation.

Count 19 4 months, concurrent to Counts 10, 11, 12, 13, 14, 15, 16 and 17, consecutive to Counts 2,3,5, 6 and17 all suspended, 1 year probation.

Count 20 4 months, concurrent to Counts 10, 11, 12, 13, 14, 15, 16, 17, and 19, consecutive to Counts 2, 3,5, 6 and 7, all suspended, 1 year probation

Count 21 4 months, concurrent to Counts 10, 11, 12, 13, 14, 15, 16, 17, 19, and 20, consecutive to Counts 2, 3, 5, 6 and 7, all suspended

Count 22 4 months, concurrent to Counts 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, and 21, consecutive to Counts 2, 3, 5, 6, and 7, all suspended.

The conditions of probation are as follows:

1. No use or possession of unlawful drugs or alcohol;

2. Submit to search and testing for alcohol drugs and pornographic material;

3. No possession of pornographic material;

4. No contact, direct or indirect, with Michelle Cote, Tabitha Clark, and Ellen Desjardins.

5. Evaluation as directed by probation officer for sexual offenders, psychological and substance abuse treatment if necessary and as directed by probation officer.

6. Sign all releases requested by probation officer.

7. DNA testing as required.

8. Sex offender registration.

Ms. Stark:

1. Count 3 7 years

2. Count 5 21 months, concurrent to Count 3

3. Count 6 4 months, concurrent to Counts 3 and 5

4. Count 7 4 months, concurrent to Counts 3, 5, and 6.

5. Count 9 5 years, consecutive to Counts 3, 5, 6 and 7, all suspended, 3 years probation.

6. Count 11 3 months, concurrent to Count 9 and consecutive to Counts 3, 5, 6, and 7, 1 year probation.

7. Count 12 3 months, concurrent to Counts 9 and 11 and consecutive to Counts 3, 5, 6, and 7, 1 year probation.

Terms of Probation: Same as Mr. Mills'.

The clerk will enter this Sentencing Analysis on the docket by reference.

DATED: September 25, 2007

William S. Brodrick
Active-Retired, Justice, Superior Court

STATE OF MAINE

HANCOCK, ss.

SUPERIOR COURT
CRIMINAL ACTION
Docket Nos. CR-05-2[75]
and CR-0&4[3]

STATE OF MAINE,

v.

FETERD. MILLS,

AMENDED
SENTENCING ANALYSIS

Defendant,

and

STATE OF MAINE,

v.

STEPHANTH E. STARK

Defendant.

When sentencing defendants on serious cases, judges are required to undertake a three-step analysis. 17-A M.R.S.A.§1252. First, the judge has to determine the basic period of imprisonment by considering the particular nature and seriousness of crime as committed by the defendant. Next, the judge has to determine the maximum period of imprisonment by considering all other relevant factors, aggravating and mitigating, appropriate to the case. During this second step in analysis, the judge considers, among other things, the defendant's character, his or her criminal history, the impact of the crime on the victim and the protection of interest. Third, the judge had to determine what portion, if any, of the maximum sentence should be suspended and how long, if at all, the defendant is to be placed on probation.

In the case the defendants were found not guilty of all of the Class A crimes which carry a maximum penalty of 30 years. Instead, they were convicted of multiple Class B crimes, each of which carries a maximum imprisonment of 10 years. Defendants were also convicted of a Class C crime and some misdemeanors, which carry lesser maximum sentence.

The key sentencing questions in this case are how much of the 10 year sentence should be imposed and

served and whether any of these sentences should be imposed consecutively.

First we examine the particulars of the Class B Gross Sexual Assaults to determine where, on the range of 0 to 10 years, the proper basic term of imprisonment lies.

Mr. Mills was convicted of 6 Class B Gross Sexual Assaults and Ms. Stark was convicted of 2 Gross Sexual Assaults. In a case involving multiple offenses of the same class, it is appropriate for the sentencing judge to select a primary offense in determining the basic term of imprisonment State of Maine v. Eugene Downs, Jr., 2007 ME 41, 9j 12, 916 A.2d 210, 213-14. I have chosen Mr. Mills' Count 3 and Ms. Stark's Count 2. They both involve defendants' gross sexual assault on Ms. Ellen Desjardins.

The particulars of this crime are grim.

The non-consensual acts include vaginal and anal penetration, penetration by vibrator, penetration by ornament and sexual mauling with hands and mouth. Both defendants engaged in sexual acts with Ellen Desjardins while she was physically incapable of resisting the acts, yet was awake enough to realize what was being done to her. The sense of helplessness and humiliation caused by this selfish, cruel conduct was vividly articulated by Ms. Desjardins on the witness stand. All Ms. Desjardins could do was plead with the defendants to stop. They did not stop.

In their sexual assault of Ms. Desjardins Mr. Mills and Ms. Stark used physical force that went beyond holding and applying pressure to a helpless woman. In particular, when Ms. Desjardins made a feeble attempt to hold her legs together to prevent some of the sexual acts, Mr. Mills used his fists repeatedly to separate her legs while Ms. Stark held Ms. Desjardins down. The finding of use of physical force does not contradict the not guilty verdicts on the count alleging forcible rape. Those not guilty findings are properly construed to mean that the jury was not satisfied that these victims submitted to a sexual act as a result of compulsion. Instead the jury found that the victims submitted as a result of being administered drugs. Evidence of a beating can exist in a case involving drugs and did exist in the assault on Ms. Desjardins.

Another pertinent fact that bears mentioning in determining the basic sentence on the Class B gross sexual assault of Ms. Desjardins is the drawn out nature of the assaults. This was not a quick over and done with act. Mr. Mills and Ms. Stark took their time.

Finally, it should be noted that the gross sexual assault on Ms. Desjardins was premeditated. This is different from the assault on Ms. Clark and Ms. Cote. The evidence concerning the sexual assault on Ms. Cote and Ms. Clark showed the crime possibly being an afterthought following a long night of voluntary drinking.

Drugs were clearly used but there is considerable doubt as to premeditation.

The assault on Ms. Desjardins happened within 48 hours after Mr. Mills and Ms. Stark had their way with Ms. Clark and Ms. Cote. Ms. Desjardins, unlike Ms. Cote and Ms. Clark, did not know Mr. Mills or Ms. Stark. They met through a fluke advertisement. Mr. Mills and Ms. Stark arrived at Ms. Desjardins' home sober and in Ms. Stark's case, uninvited. The assaults did not follow a long night of voluntary drinking. Ms. Desjardins was rendered helpless almost immediately after a small amount of wine. This was clearly a premeditated decision to commit sexual mayhem.

Having examined all of the particulars and the seriousness of the crime, I am satisfied that the basic sentence for Ms. Stark's Count II and Mr. Mills Count Ill Gross Sexual Assault should be 10 years.

The particulars of the gross sexual assaults against Ms. Cote and Ms. Clark by Mr. Mills (Counts 10 & 17) and Ms. Stark (Count 9) are similar in some respects to the gross sexual assault on Ms. Desjardins but not in all respects. There is no evidence that Mr. Mills used his fists. There was no evidence of the use of glass ornaments for penetration. There was evidence that drugs were administered. Ms. Clark's feeling of helplessness almost exactly replicated Ms. Desjardins experience. Also the assaults were drawn out. Nevertheless, as stated above, it is difficult to tell whether these assaults were planned or

simply evolved from a night of voluntary, heavy drinking. The assault on Ms. Cote and Ms. Clark was first in time and this adds to the ambiguity. The lack of clear evidence of planning makes the criminal conduct somewhat lower down on the continuum for this type of offense.

I am satisfied that the basic sentence for Ms. Stark's Count 9 and Mr. Mills' Counts 10 and 17 should be 7 years.

Mr. Mills was convicted of actually administering the drugs to all three victims (Counts 2, 9, and 16) while Ms. Stark was acquitted of that same charge (Counts 2 and 8). Because the administration of the drug was closely intertwined with the sexual assaults that followed, I am satisfied that the basic sentence on Mr. Mills' Count 2 should be 10 years as well. The basic sentence on Mr. Mills' Count 9 and 16 should be 7 years. All other basic sentences connected to the assault on Ms. Cote and Ms. Clark should be reduced proportionately.

In examining the other charges for which Mr. Mills and Ms. Stark were convicted, I find that the basic sentence should be at the mid-point of the statutory range. This does not mean this criminal conduct was not reprehensible. It was. It simply means that on a continuum of such charges, they are not unusual. Therefore, on Mr. Mills' Count 5 the basic sentence is 30 months. On Mr. Mills' Counts 12, 13, 14, 15, 16, 20, 21 and 22, the basic sentence is 4 months. On Mr. Mills' Counts 6 and 7 the basic sentence is 6 months. On Ms.

Stark's Count 5 the basic sentence is 30 months. On Ms. Stark's Counts 6 and 7 the basic sentence is 6 months. On Ms. Stark's Counts 11 and 12, the basic sentence is 4 months.

The next step in the sentencing process under 17-A M.R.S.A. § 1252-C (2) is to determine the maximum period of imprisonment. The sentencing judge must consider all other relevant sentencing factors, both aggravating and mitigating, that are relevant to the case. I find the following factors to be relevant:

1. Criminal Record: Mr. Mills has no criminal history of any note. He has a few minor youthful indiscretions and a few speedings, only one of which is recent Ms. Stark has two convictions for operating under the influence but no record of violent crimes of any sort or of any crimes not involving a motor vehicle. This is a mitigating factor for both defendants.

2. Character of the Defendants: Mr. Mills' character, according to the letters submitted on his behalf, was exemplary prior to the time he committed these crimes. He has made significant contributions to his community. Both his employer and his employees (he has held several management positions) describe him as hard working, intelligent, dependable, professional, honest, loyal, trustworthy and respectful of both men and women. He is praised for the good things he has done for his parents. He is loved by his child, his nephews and nieces. His

family describes him as a loving, caring, warm, compassionate and forgiving. His friends describe

him as helpful, quick-witted, humorous, outgoing, kind, sensitive, thoughtful and generous. His friends say he is a giver, not a taker. Even his ex-wife describes him as caring, considerate, compassionate and generous.

Ms. Stark has submitted letters as well. She is described as a fine person with many excellent qualifies. Her PSI reveals that she took steps to educate herself with a Bachelor's in Environmental Science. She secured a good job at Jackson Laboratory. She is a hard worker. She seems to have been a productive citizen prior to committing these crimes.

Mr. Mills' character, as reflected in the letters submitted on his behalf, is another mitigating factor. Character is a mitigating factor for Ms. Stark as well.

3. The Effect of the Offenses on the Victims: The victims those not to submit impact statements. Nevertheless, all three testified at trial. Ms. Clark came across as a very strong, intelligent young woman. She realizes something very bad happened to her. She is determined to put this incident behind her and not let this assault ruin her life. She would not even have reported the crime except that she wanted to support her friend, Michelle Cote. Ms. Clark is pursuing a graduate degree at a prestigious university.

Ms. Cote has been hurt by this attack. Because she was unconscious until the end of the assault, she remembers little of it. She knows from what little she remembers and from the condition of her body after the assault that she was violated. She is an intelligent young lady pursuing a teaching career. It is difficult to tell how this crime will affect her down the road.

Judging from her testimony on the stand, Ms. Desjardins is haunted by the attack. She remembered very little at first. Now the details of the attack come in flashes so she is constantly reminded of her fear and humiliation. Ms. Desjardins is a registered nurse and not without resources. Nevertheless, she has been deeply scarred by this crime.

The effect of these crimes on the victims, especially Ms. Desjardins, is a significant aggravating factor,

4. Protection of the Public Interest: It is difficult to tell whether Mr. Mills or Ms. Stark would be a future threat. Mr. Mills' risk assessment in the pre-sentence investigation (PSI) is contradictory. Ms. Stark's risk assessment is low, but the test, through no fault of hers, is not reliable. There is no evidence that either Mr. Mills or Ms. Stark has done anything like this before. Mr. Mills is 50 and will be in his mid to late 50's when he finishes his prison term. Men that age are less likely to re-offend. Ms. Stark, for reasons discussed below, does not strike me as a repeat offender. Protection of the public interest is neither an aggravating or mitigating factor.

5. Multiple Offenses: The Law Court in State of Maine v. Eugene Downs Jr.,2007 ME 41, ¶ 12, 916 A.2d 210, 214, said that multiple offenses are an aggravating factor. Mr. Mills was convicted of 6 Class B crimes,1 Class C crime, and 10 misdemeanors, 6 of which were offenses against the person. That totals 13 offenses against the person and is a significant aggravating factor. Ms. Stark was convicted of 2 Class B crimes, 1 class C crime, and 4 misdemeanors, all of which were crimes against the person, That is an aggravating factor but less significant by degree.

6. Multiple Defendants: The jury decided that Mr. Mills and only Mr. Mills administered the drugs that rendered these victims helpless. There was other evidence in this case to support an inference that although Ms. Stark was a willing participant, Mr. Mills was the leader and Ms. Stark was the follower. Ms. Stark testified (and the testimony of Ms. Clark and Ms. Desjardins appeared to corroborate this) that Mr. Mills' libido was waning and he urged Ms. Stark to have lesbian sex to help him get sexually aroused. Ms. Stark was having an affair with Mr. Mills and was willing to cooperate. The evidence suggests that but for Mr. Mills, these crimes would never have happened. Mr. Mills' role as leader is an aggravating factor. Ms. Stark's role as a follower is a mitigating factor.

7. Remorse: None. Mr. Mills says nothing happened. He blames the victims and the District Attorney for wrongfully prosecuting him. At trial Ms. Stark testified

that whatever happened was consensual. Now she has chosen to say nothing. Ms. Stark's testimony at trial is an aggravating factor. Mr. Mills' attitude as expressed in his PSI is a significant aggravating factor.

Having weighed the aggravating and mitigating factors, I am satisfied that the maximum sentence for Mr. Mills should remain 10 years and the maximum sentence for Ms. Stark on her Class B conviction involving Ms. Desjardins should be reduced to 7 years. This reduction has nothing to do with differences in gender. It has everything to do with the jury determination that the moving party in these crimes was Mr. Mills. To be consistent Ms. Stark's other maximum sentences should be reduced proportionately. Therefore, Ms. Stark's Count 9 will be 5 years. Her Count 5 maximum sentence will be 21 months. On Ms. Stark's Counts 6 and 7 her maximum sentence will be four months. On Ms. Stark's Counts 11 and 12, her maximum sentence will be three months.

Step three of the sentencing process requires the judge to determine what portion, if any, of the maximum period of imprisonment should be suspended and further determine what period of probation is appropriate. However, before the court addresses the issue of suspension and probation, it is appropriate in a case such as this that involves multiple crimes, to address the issue of consecutive sentences.

The Legislature has provided the groundwork for consecutive sentences in 17-A M.R.S.A. § 1256. Looking at

the legislative guidelines, I find that neither Mr. Mills nor Ms. Stark was out on bail when these crimes were committed. Nor were they on probation. Nor do the defendants have criminal records of any import. However, I find that their present convictions are based on two discrete crimes. The conduct was similar but the crimes were discrete in regard to time, place and the victims. Ms. Desjardins had no connection whatsoever with Ms. Clark and Ms. Cote. Imposing all of these sentences concurrently would mean, in effect, that there would be no punishment for one or the other victim. It is true that multiple crimes were considered in determining the maximum sentences. Nevertheless, retribution is a very important part of the sentencing process. Concurrent sentences would create the appearance of no retribution for either Ms. Desjardins on the one hand or Ms. Cote and Ms. Clark on the other. Consecutive sentences are appropriate in this case.

Turning now to the issue of suspension. The crimes are heinous and deserve serious imprisonment. Nevertheless, both Mr. Mills and Ms. Stark are first offenders and both have led productive lives in the past. The sentence must not diminish the gravity of the offense. At the same time it must encourage rehabilitation if that is possible. Given the age of these defendants, their lack of any criminal history, and their formerly productive lives, and their strong support groups, I believe rehabilitation is possible through al combination of an appropriate period of incarceration followed by probation with counseling conditions.

The sentences will be:

Mr. Mills:
Count 2 10 years

Count 3 10 years

Count 5 30 months

Count 6 6 months, $400 fine

Count 7 30 months

Count 9 7 years, consecutive to Counts 2, 3, 5, 6, and 7, all suspended, 3 years probation

Count 10 7 years concurrent to Count 9, consecutive to Counts 2,3,4,5, and 7, all suspended, 3 years probation

Count 11 26 months, concurrent to Counts 9 and 10, consecutive to Counts 2, 3, 5, 6 and 7, all suspended, 2 years probation

Count 12 4 months, concurrent to Counts 10 and 11, consecutive to Counts 2, 3, 5, 6 and 7, all suspended, 1 year probation

Count 13 4 months, concurrent to Counts 10, 11, and 12, consecutive to Counts 2, 3, 5, 6 an 7, all suspended, 1 year probation

Count 14 4 months, concurrent to Counts 10, 11, 12 and 13, consecutive to Counts 2, 3, 5, 6 and 7, all suspended.

Count 15 4 months, concurrent to Counts 10, 11, 1~ 13, and 14, consecutive to Counts 2, 3,5,6 and 7, all suspended

Count 16 7 years, concurrent to Counts 10, 11, 12, 13, 14, and 15, consecutive to Counts 2, 3, 5, 6 and 7, all suspended, 3
years probation

Count 17 7 years, concurrent to Counts 10, 11, 12, 13, 14, 15, and 16, consecutive to Counts 2, 3, 5, 6 and 7, all suspended, 3 years probation

Count 19 4 months, concurrent to Counts 10, 11, 12, 13, 14, 15, 16 and 17, consecutive to Counts 2,3,5,6 and 7, all suspended, 1 year probation

Count 20 4 months, concurrent to Counts 10, 11, 12, 13, 14, 15, 16, 17, and 19, consecutive to Counts 2, 3, 5, 6 and 7,all suspended, 1 year probation

Count 21 4 months, concurrent to Counts 10, 11, 12, 13, 14, 15, 16, 17j. 19, and 20, consecutive to Counts 2, 3, 5, 6 and 7, all suspended

Count 22 4 months, concurrent to Counts 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, and 21, consecutive to Counts 2, 3, 5, 6 and 7, all suspended.

The conditions of probation are as follows:

1. No use or possession of unlawful drugs or alcohol;

2. Submit to search and testing for alcohol, drugs and pornographic material;

3. No possession of pornographic material;

4. No contact, direct or indirect. with Michelle Cote, Tabitha Clark and Ellen Desjardins

5. Evaluation as directed by probation officer for sexual offenders, psychological and substance abuse treatment if necessary and as directed by probation officer.

6. Sign all releases requested by probation officer.

7. DNA testing as required.

8. Sex offender registration.

Ms. Stark

1. Count 3 7 years

2. Count5 21 months, concurrent to Count 3

3. Count 6 4 months, concurrent to Counts 3 and 5

4. Count 7 4 months, concurrent to Counts 3, 5, and 6

5. Count 9 5 years, consecutive to Counts 3, 5, and 7, all suspended, 3 years probation

6. Count 11 3 months, concurrent to Count 9 and consecutive to Counts 3,5, 6, and 7, all suspended, 1 year probation

7. Count 12 3 months, concurrent to Counts 9 and 11 and consecutive to Counts 3,5, 6, and 7, all suspended, 1 year probation

Terms of Probation: Same as Mr. Mills'.

The clerk will enter this Sentencing Analysis on the docket by reference.

DATED: September 27, 2007

William S. Brodrick
Active-Retired Justice, Superior Court